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Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

JEFF BRYANT,

Petitioner,

v.

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.

Respondents

and

WILLIAM GUNTER,

Petitioner,

v.

CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents

On Petition for Writ of Certiorari To
The District Court of Appeal, First District
State of Florida

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX "L"

Excerpt of Record of Hearing as to Petitioner Gunter before Hon. Jonathan D. Ohlman, Judge of Compensation Claims, held on October 23, 1997

***

MR. STALEY: Yes, Your Honor. The first deposition of Dr. Cerra was filed months and months ago. No objection was raised at that time regarding it. Regarding the second deposition, no specific objection as to those grounds was raised there, and alternatively, he should be considered as an IME and we, -- when just --just the games basically of having him perform an additional and separate cumulative exam for this whole purpose of being able to testify. Also, I would raise issues regarding some of his testimony may be observance as opposed to expert testimony, and that, in my belief, the provision precluding certain expert witness testimonies would be a violation of the constitution on several grounds, and I think we agreed at previous times that the specific violates would not need to be cited here since-- (Transcript, p. 630-631)

***

JUDGE OHLMAN: Okay, I'm going to allow the testimony--by the deposition--to be introduced into evidence, but reserve ruling on the various questions and answers that opposed Dr. Cerra.. I interpret the law that 440.13 (5) (e)--I think it is--precludes any medical opinion. But for example, just in picking up Dr. Cerra's deposition, he in the beginning discusses the statements made to him by the claimant which I do not believe falls under the category of a medical opinion. He also, I think, discusses other matters which may mot constitute a medical opinion, so I think the deposition itself is not necessarily precluded in terms of the opinions

expressed. I guess I'll have to wait and review that in the overall totality of the evidence.

Mr. Staley, let me address --- I agree that you don't need to raise any constitutional arguments at this level, but I don't want that to be interpreted that I am precluding any presentation of evidence or other---whatever you want to do. I simply mean that I ---argument for the purpose of persuading me to rule one way or the other on a constitutional issue doesn't make much sense, but whatever evidence or other matters you believe needs to be presented on that issue, I don't mean in any way to limit you from. So, with that, are there any other objections to any of the evidence? (Transcript, p. 633-634)

APPENDIX "M"

Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 5, 1998 as to Petitioner Gunter.

STATE OF FLORIDA
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT "B"

EMPLOYEE:	ATTORNEY FOR CLAIMANT:
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Florida League of Cities
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CLAIM NO.: 267-74-2994

D/ACC: 12/3/95

ORDER

AFTER PROPER NOTICE TO ALL PARTIES, a trial was held on this claim in Ocala, Marion County, Florida on October 23, 1997, before the Honorable Jonathan D. Ohlman, Judge of Compensation Claims. Present at the trial

were the claimant, William Gunter, and his attorney, Michael B. Staley. Appearing on behalf of the Employer/Carrier was Alan D. Kalinoski. At the conclusion of the hearing, the parties requested an opportunity to present one or more proposed orders in lieu of any closing argument or memorandum of law. This request was granted and, with the agreement of the parties to waive the timeliness requirements in the rules and statutes, final consideration was delayed until February 28, 1998.

At the pre-trial conference or prior to the conclusion of the proceedings, the parties stipulated to the following:

1. The Judge of Compensation Claims has jurisdiction over the subject matter and the parties.

2. The date of accident was 12/3/95, and an employee/employer relationship existed on the date of accident. All other dates of accident were withdrawn.

3. The proper venue is Marion County, Florida.

4. Workers' compensation insurance was in effect on the date of the accident.

5. The accident was accepted as compensable.

6. There was timely notice of the accident, of the pre-trial conference and of the final hearing.

7. The base average weekly wage (AWW) is $649.72 with a corresponding compensation rate of $433.15. Fringe benefits were continuing as of the date of the final hearing.

8. Notices of Denial were filed on 3/26/96, 5/3/96, 6/3/96, 2/4/97 and 2/10/97, although the Claimant agreed to waive any claim for penalties in light of the filing of these documents in a timely manner.

9. The parties agree that the claimant reached MMI per Dr. Overcash on 3/22/96. The parties disagreed on the impairment rating. The parties also disagreed as to whether the claimant is at MMI from a psychiatric standpoint, although the E/C denies any causal relationship between the claimant's psychiatric treatment and the 12/3/95 accident.

10. If medical benefits under §440.13 are determined to be due, the exact amounts payable to health care providers will be handled administratively, and the medical bills need not be placed into evidence.

11. The claimant received authorized medical treatment from Dr. William Todd Overcash.

12. The claimant continued working until 12/29/95 and TTD benefits were paid from 12/29/95 through 3/20/96.

13. Petitions for Benefits were sent, dated 3/18/96, 4/22/96, 5/30/96, 10/15/96 and 12/30/96.

14. Evidence regarding entitlement and amount of attorney's fees, if necessary, will be introduced by hearing.

15. The following documentary items were admitted into evidence:

E/C and Claimant's Joint Exhibit:

Pre-Trial Stipulation and Compliance Questionnaire.

Claimant's Exhibits:

Deposition of Charles Vowinkle taken 1/24/97;

Deposition of Dr. Edward Weinshelbaum taken 7/15/97;

Deposition of Dr. Edward Weinshelbaum taken 7/29/97;

Deposition of Dr. Domingo Cerra taken 1/31/97;

Deposition of Dr. Domingo Cerra taken 9/26/97;

Photograph of claimant's gunbelt; and

Letter dated 9/19/96 from Belleview Chief of Police E. J. Becker to claimant.

E/C's Exhibits:

Deposition of Dr. William Overcash taken 10/11/96;

Deposition of Dr. Earl Stewart taken 1/30/97;

Deposition of Dr. Donald Hagan taken 5/29/96;

Records from Ocala Police Dept. (three pages); and

Medical records from Dr. Earl Stewart.

The Employer/Carrier objected to the admissibility of the two depositions of Dr. Cerra citing §440.13 (5) (e) which provides that "no medical opinion other than the opinion of a medical adviser appointed by the judge of compensation claims or Division, an independent medical examiner, or an authorized treating provider is admissible before the judges of compensation claims." That objection is addressed later in this order.

At the trial, live testimony was taken from the claimant, William Gunter; the claimant's wife, Bobbi Gunter; Chief Emil J. Becker; and Ruth Peters.

The issues claimed, as narrowed immediately prior to the final hearing are as follows:

1. Compensability of left side problems.
2. Temporary partial disability (TPD) from 3/21/96 and continuing through the date of the hearing.
3. Permanent total disability (PTD) from 1/31/97 and continuing through the date of the hearing.
4. Authorization of a psychiatrist.
5. Authorization of a psychiatric IME with Dr. Domingo Cerra.
6. Interest, costs and attorney's fees.

The original claim as provided in the Pre-Trial Stipulation was for "compensability of left side hernia." The claimant moved to amend his claim at the time of trial to "compensability of left side problems." The Court granted this amendment to the claim under the authority of Sabal Transport v. Brooks, 666 So. 2d 1032 (Fla. 1st DCA 1996). Additionally, the Claimant waived any claim that the JCC should determine that disability should be based upon "full pay status" in light of the ruling in Williams v. City of Fort

Walton Beach, 691 So. 2d 580 (Fla. 1st DCA 1997); waived any claim for benefits arising out of the 1988 injuries; and waived any claim for benefits arising out of the 1988 injuries; and waived any claim for statutory penalties. The parties agreed that the abdominal surgery which had been requested had been performed; therefore, that issue was now moot, except for whether an attorney's fee was due because of an untimely authorization of the surgery.

The defenses raised by the Employer/Carrier, and set out on the pre-trial stipulation form, are as follows:

1. The 12/3/95 accident has been accepted as compensable, although there was no hernia caused as a result of the 12/3/95 incident.

2. The claimant has had multiple hernia and abdominal problems dating as far back as 1971, which are not causally related to the 12/3/95 incident.

3. The 12/3/95 incident is not the major contributing cause of the claimant's current problems.

4. The claimant's current problems are related to long standing abdominal weakness, which resulted in numerous surgeries which were unrelated to and pre-existed the 12/3/95 incident.

5. The claimant was released to return to work on 3/15/96 per Dr. Overcash; the claimant actually returned to work on 3/21/96; the claimant was placed at MMI by Dr. Overcash on 3/22/96 with a 0% impairment.

6. The Employer has continuously maintained work available for the claimant which the claimant has refused; claimant has voluntarily limited his income and is not entitled to additional indemnity benefits pursuant to §440.15(7).

7. The claimant is not catastrophically injured pursuant to §440.15 (1), and no permanent total disability benefits are due.

8. Claimant's alleged psychiatric problems are not related to the 12/3/95 incident; psychiatric treatment not

medically necessary; insufficient physical injury resulting from the 12/3/95 incident.

9. The claimant received treatment from Dr. Domingo Cerra, psychiatrist, which was unauthorized, prior to filing a Petition for Benefits for a psychiatric IME with Dr. Cerra. Accordingly, Dr. Cerra cannot be designated as a psychiatric IME.

10. No interest, costs or attorney's fees due.

This case involves a 52 year old police officer who has been employed by the City of Belleview for approximately fifteen (15) years. On December 3, 1995, William Gunter claims an accident while getting into his patrol car when his gunbelt pressed on his abdomen, and he stated that he thought he felt a "pop" in his stomach area. The claimant believed that he incurred a hernia as a result of this incident. However, according to the greater weight of the medical evidence, no such hernia occurred.

Prior to the 12/3/95 incident, the claimant had approximately eight (8) prior hernia and abdominal surgeries. The claimant's first hernia problem and resulting surgery occurred as a result of an accident which occurred in 1971 while the claimant was working for the City of Ocala. On 12/19/90, the claimant incurred a ruptured diverticula which required a colostomy. The claimant had a reversal of the colostomy in April 1991 and underwent surgery for adhesions in May 1991. The claimant had an incisional hernia repair done in September 1991. The claimant had another incisional hernia repair performed on 12/3/91. The claimant had a hernia repair at the prior colostomy site on 4/26/93. Finally, the claimant incurred a hernia repair with mesh on 4/6/94.

In July and November of 1995, the claimant treated with Dr. Hagan concerning pain and problems wearing his gunbelt and vest. The claimant continued to mention abdominal pain through the date of the 12/3/95 incident, but testified that he was able to work and perform various

physical tasks before the subject incident. Following this incident in 1995, the claimant continued working with the City of Belleview and did not seek medical care until about a month after the 12/3/95 incident. The claimant came under the care of Dr. Overcash who on 3/5/96 performed an exploration of the claimant's prior incisions. Although it was suspected that the claimant may have incurred a hernia, no hernia was confirmed by the exploratory procedure performed by Dr. Overcash or by Dr. Weinshelbaum's examination. Dr. Overcash released the claimant to return to work on 3/15/96 and placed the claimant at MMI on 3/22/96 with a zero percent (0%) impairment rating and no restrictions.

The claimant returned to work with the City of Belleview through August 30, 1996, at which time he stopped coming into work, shortly after he had been disciplined by the Chief of Police for various acts of insubordination. The Employer maintained that they had work available for the claimant since 8/30/96, which the claimant has refused. The claimant has not returned to work since then.

Prior to making any request to the Employer/Carrier for authorization of a psychiatrist, the claimant initially went to see an Ocala psychiatrist, Dr. Domingo Cerra, on 9/10/96. Dr. Cerra was not ever authorized by the Employer/Carrier to provide treatment to the claimant. No Petition for Benefits was filed regarding authorization of a psychiatrist until 10/15/96. Through the time of the trial, no motion had been filed by the claimant regarding a psychiatric IME with Dr. Cerra, and there was no request for continuance of the trial so that the issue of a psychiatric IME could be addressed prior to a decision on the merits.

In making my findings of fact and conclusions of law on the claim, I have carefully considered and weighed all of the evidence presented to me, both by deposition testimony and by the live testimony presented at the trial. I have observed the candor and demeanor of the witnesses who

appeared live before me and I have attempted to resolve all of the conflicts in the evidence. Based upon the foregoing, the evidence and the applicable law, I make the following determinations:

I approve and adopt the stipulations of the parties as findings of fact as if set out at length herein.

Following my review of all of the evidence, I find that the incident of 12/3/95 qualified as an accident. However, there was no competent substantial medical evidence adduced at the final hearing to establish that the 12/3/95 incident resulted in any verifiable, permanent physical "injury" as defined by §440.02 (17). Accordingly, I find that the 12/3/95 accident did not result in any permanent physical incapacity, and the parties have stipulated that the E/SA provided TTD benefits from shortly after the accident through 3/20/96. Even if the exploration procedure performed by Dr. Overcash in early March 1996 could be viewed as causing some type of limited trauma of injury, there is no evidence of any disability from the time Dr. Overcash released the claimant to return to work with no restrictions on 3/22/96. Therefore, I find that the claimant is not entitled to temporary partial disability (TPD) from 3/22/96 and continuing.

Pursuant to the agreement of the parties, the claimant reached MMI per Dr. Overcash on 3/22/96. I find that the claimant has not suffered any permanent impairment as a result of the 12/3/95 incident. I further find that the claimant is not catastrophically disabled as required by §440.02 (34), and the claimant, therefore, is not entitled to permanent total disability (PTD) benefits pursuant to §440.15 (1).

The claimant testified that on 12/3/95, while in the course and scope of his employment, his gunbelt and protective vest pressed on his abdomen as he was getting into his patrol car. Section 440.02 (1) defines the term "accident" as "an unexpected or unusual event or result that happens suddenly. A mental or nervous injury due to stress ... is not an injury by accident arising out of the

employment." By giving §440.02 (1) a broad interpretation, the claimant technically sustained an accident. However, for ongoing benefits to be payable from an accident, there must be an actual physical injury and disability resulting from the accident. Section 440.02 (17) defines injury as "personal injury or death by accident arising out of and in the course of employment." The evidence shows that while the claimant believed that he had sustained a hernia as a result of the 12/3/95 incident, no hernia or other injury was incurred according to the greater weight of the medical evidence.

Following the 12/3/95 incident, the claimant continued working his regular job for over a month before obtaining any medical treatment. The claimant complained of abdominal pain and felt that he might have sustained another hernia. The workers' compensation carrier authorized medical care for the 12/3/95 incident and the claimant came under the care of Dr. William Todd Overcash, general and vascular surgeon. Based upon the history given by the claimant, Dr. Overcash suspected that the claimant may have sustained another hernia. Dr. Overcash performed a diagnostic procedure on 3/5/96 which revealed that the claimant did not incur a hernia. Dr. Overcash testified that this was a condition that was caused by the multiple prior abdominal surgeries related to the 1990 ruptured diverticulitis problem and resulting colostomy. Dr. Overcash specifically indicated that the pressure of the protective vest and gunbelt should not cause or aggravate the claimant's prior inguinal hernia and/or abdominal problems.

Dr. Overcash informed the claimant that he did not detect a hernia and that he should return to work wearing the gunbelt and protective vest. He felt that the claimant could return to work with no restrictions as of 3/22/96. As previously set out, the E/SA provided TTD benefits from late December through 3/20/96. Dr. Overcash thought that the claimant could functionally return to full duty, but felt that the claimant chose not to do so. Dr. Overcash felt that the claimant's motivation to return to work was somewhat

suspect, as he indicated that the claimant was apparently able to ride his Harley Davidson motorcycle, but did not feel that he could return to work. Dr. Overcash's testimony is corroborated by the testimony of Dr. Weinshelbaum, who first examined the claimant on 3/29/96. Dr. Weinshelbaum agreed that the exploratory procedure did not reveal any evidence of any recurrent hernias, and that the CT scan was normal. The claimant had subjective pain without any objective findings. Dr. Weinshelbaum testified that it would be speculative to state that the 12/3/95 incident even aggravated the claimant's problems. Dr. Weinshelbaum deferred to Dr. Overcash regarding any connection between the claimant's symptoms of pain and the claimant's employment. Dr. Weinshelbaum did not have any knowledge of the events regarding the 12/3/95 incident, and he felt that Dr. Overcash should have more precise knowledge. Accordingly, to the extent that there is any conflict between the testimony of Dr. Overcash and Dr. Weinshelbaum, I rely upon the testimony of Dr. Overcash, primarily because Dr. Overcash had more contact with the Claimant, although there does not seem to be a significant amount of inconsistency between the two.

The claimant has the burden of proving that he sustained a work related accident and resulting injury and, in cases of subsequent injuries and pre-existing conditions, that the work related injury is the "major contributing cause" of the subsequent injury or aggravation. See Mangold v. Rain Forest Gulf Sports Center, 675 So. 2d 639 (Fla. 1st DCA 1996); §440.09 (1) (a) & (b), Florida Statutes (Supp. 1994). Dr. Overcash specifically found that the claimant did not sustain any injury as a result of the 12/3/95 incident, and this testimony is unrefuted by the testimony of any other authorized doctor.

It could conceivably be argued that although the 12/3/95 incident did not result in any specific injury, the exploration procedure performed by Dr. Overcash itself may have caused some type of injury. Such an argument is

refuted by the medical evidence. Dr. Overcash specifically described the exploratory procedure. He indicated that the procedure involved only a skin incision. The exploratory procedure did not involve an incision of the muscle or fascia. The exploratory procedure should have only created tenderness which would resolve within a two week period of time. Nor did the exploratory procedure cause the claimant any permanent impairment. Even if, assuming arguendo, the exploratory procedure caused some inherent injury, there is no evidence of any disability from the time Dr. Overcash released the claimant to return to work with no restrictions effective 3/22/96, and the Claimant received benefits during this period. He was placed at MMI on that date with no permanent impairment. Accordingly, the claimant is not entitled to additional temporary disability benefits.

The serious nature and extent of the claimant's pre-existing abdominal problems cannot be overlooked. With approximately eight prior hernia and abdominal surgeries, it is beyond challenge that the claimant had experienced significant abdominal problems. Although the claimant testified that he was in "relatively good health" and was only experiencing "slight" abdominal soreness prior to the 12/3/95 incident, other evidence is not entirely consistent with that opinion. The testimony and medical records of Dr. Earl Stewart, board certified general surgeon, provide documentation of the extent of the significant abdominal problems the claimant incurred which pre-existed the 12/3/95 incident.

Rita Taylor also testified at the final hearing concerning the significance of the claimant's pre-existing problems. She was a data entry clerk at the time of the 12/3/95 incident and indicated that , prior to the 12/3/95 incident, the claimant was on light duty and had been sick repeatedly with abdominal problems. Ms. Taylor was aware of the fact that the claimant had several operations prior to the 12/3/95 incident. Ms. Taylor did not actually observe the claimant performing his work duties following the 12/3/95

incident, but she was aware of the claimant's significant pre-existing abdominal problems.

Although the claimant characterized his abdominal problems prior to the 12/3/95 incident as being only "slight," the record shows that the claimant came under the care of Dr. Donald Hagan in July 1995, for abdominal pains. In fact, the claimant treated with Dr. Hagan approximately one month prior to the 12/3/95 incident at which time he was again complaining of abdominal discomfort. The claimant was noted to have a lot of scar tissue and inherent weakness over the abdominal area involving "such a large piece of mesh." Furthermore, Dr. Hagan suggested that the claimant not wear the gunbelt and vest. Dr. Hagan felt that the claimant should not wear the gunbelt and vest because it made him feel uncomfortable. Accordingly, the evidence shows that any restriction against the claimant wearing the gunbelt and vest was not the result of the 12/3/95 incident, but existed prior to that time.

The claimant testified that he returned to work for the Belleview Police Department on 3/21/96 and that Dr. Overcash had released him to work with no restrictions. The claimant indicated that even though Dr. Overcash did not place any restrictions on him, he was allowed to work without being required to wear the gunbelt and vest and was allowed to remain in the office to provide advice and guidance to subordinates without having to respond to regular police calls. The claimant admitted that Chief Emil Becker agreed to these accommodations so the claimant would not be exposed to re-injure himself or others. the claimant indicated that work was maintained available for him after his accident and he was never told that he did not have a job. He acknowledged that he stopped working for the City of Belleview on or about 8/30/96, indicating that he stopped coming into work on his own, without a medical excuse. Complicating the cause of the claimant's current medical problems and alleged disability was the fact that the claimant was injured in an explosion accident at home in

January of 1997. The force of the explosion lifted the claimant into the air and caused severe burns to his arms, left side of his body, and to his wrist. Furthermore, the claimant had another unrelated medical problem which required right shoulder surgery in October of 1997, just a few days prior to the trial.

Emil J. Becker, Police Chief for the City of Belleview, testified on behalf of the Employer/Carrier. Chief Becker is currently the Chief of Police for the City of Belleview, and stated that he has known the claimant for about twenty (20) years. Chief Becker indicated that the claimant had been a good employee and a good police officer. I accept Mr. Becker's testimony as credible. To the extent that there is any conflict between the testimony of Mr. Becker and the claimant, I rely upon the testimony of Mr. Becker, who testified that the claimant had been promoted to a position which put him near the top in command for the police department.

Mr. Becker was aware of the claimant's prior problems concerning hernia and abdominal problems. Consequently, he sought the advice of Dr. Overcash concerning whether the claimant had any work restrictions. Dr. Overcash indicated that, as of 3/22/96, the claimant was allowed to work with no restrictions. Even though the authorized physician, Dr. Overcash, did not place any restrictions on the claimant, Mr. Becker indicated that the claimant still complained of pain while wearing the gunbelt and vest. Accordingly, Mr. Becker indicated that he initially made an accommodation for the claimant so he would not have to wear the gunbelt and vest.

Mr. Becker testified that the claimant was instructed not to respond to any police calls whatsoever, not to do any lifting or bending, and was not required to wear the gunbelt or vest. The claimant's responsibilities were primarily administrative in nature. He was to provide advice and guidance to other officers. Chief Becker agreed to these

accommodations in order to avoid injury to the claimant, members of the public or other officers.

Mr. Becker indicated that the claimant failed to follow specific orders concerning these work parameters on several occasions. As a result of the claimant's failure to abide by these orders, Chief Becker decided to take disciplinary action in the latter part of August or early September of 1996. Shortly thereafter, the claimant began to fail to show up for work.

Mr. Becker sought clarification from Dr. Overcash concerning the claimant's work restrictions. Upon learning that there were no restrictions after 3/22/96, Mr. Becker sent a letter to the claimant dated 9/19/96 with the instruction that the claimant should return to work full duty. Thereafter, Mr. Becker indicated that he received some information from Dr. Cerra which indicated that the claimant had been experiencing pain while wearing the gunbelt and vest, so Chief Becker indicated that he was willing to allow the claimant to continue to work in a light duty capacity, with hope that the claimant would eventually be able to return to work as a regular police officer. Nevertheless, the claimant did not contact Chief Becker or return to work thereafter.

The claimant testified that Mr. Becker appeared at his home on two occasions and berated him in front of his wife and children. He said that Chief Becker yelled at him when he went to the claimant's house some time in the early part of September 1996. Mr. Becker denied that there was anything improper about the two meetings at the claimant's home. Mr. Becker's testimony is supported by the testimony of the claimant's wife, who indicated that she did not remember Chief Becker speaking in a raised voice when he appeared at their home. Mrs. Gunter indicated that she was aware of the claimant's multiple surgeries prior to the 12/3/95 incident and confirmed that the claimant complained of pain in his abdomen prior to the 12/3/95 incident. All of this information provides competent and substantial evidence to support the position of the E/C that the incident of 12/3/95 is

not the major contributing cause of the problems or conditions experienced by the claimant during the period of time in question.

With regard to the claims for a psychiatric independent medical examination (IME) by Dr. Cerra and for authorization of psychiatric care, it is important to note the sequence of events. The claim for a psychiatric IME was included among the claims on a Petition for Benefits, dated 10/15/96, as well as being listed on the pre-trial stipulation form, which was signed on behalf of the Claimant on 12-30-96. Counsel for the Claimant acknowledged at the beginning of trial that no motion for IME had ever been filed, and that the request for a psychiatric IME had never been called for hearing prior to the date of trial. It is further significant that, upon request of the Employer/Carrier, the trial was continued from the originally scheduled date of 2-7-97 to 10-23-97. However, for reasons not fully explained before or at trial, no motion was filed and no request was ever made prior to the date of trial for any hearing or ruling on the request for a psychiatric IME. As in the case of Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), the Claimant went on his own to see a physician (Dr. Cerra, a local psychiatrist) without seeking prior authorization, and then attempted to introduce testimony from that physician at trial. Again, although there was a request for a psychiatric IME on the pre-trial stipulation, no motion was filed and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section 440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (Citation omitted).

When the claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in Section 440.13 (5) (e) of the Florida Statutes, the appellate court ruled that such witness could not properly testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant makes it known that he requests an IME, when the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived. Otherwise, the trial would have to be continued after all parties and witnesses had appeared at the forum, and the legislative intent to facilitate the "prompt and cost-effective delivery of payments" will be unnecessarily frustrated and delayed. Section 440.015, Fla. Stat. (Supp. 1994). See also Fla. R. Work. Comp. P. 4.075 (c) (1). It must be noted that this determination is limited to the particular facts presented herein; no wide-ranging policy statement should be inferred by the result in this proceeding. Had the facts been different, a different result might well have been reached.

Nevertheless, under the circumstances presented, I find that the request by the Claimant for a psychiatric IME has been waived by the failure to seek a ruling on that request prior to the date of trial. With that waiver, the objection of the E/SA to the testimony of Dr. Cerra must be sustained, and the medical opinions of Dr. Cerra must be excluded from consideration as he does not fall into a statutorily permitted category of medical witnesses. Without such testimony from Dr. Cerra, the record does not contain competent and substantial evidence to support a determination that the subject incident was the major contributing cause of any psychiatric injury; to support a determination by "clear and convincing evidence," to use the language of Section 440.09 (1) of the Florida Statutes, that any mental or nervous injury sustained by the Claimant was

compensable; or to support the claim for authorization of psychiatric care and treatment. Accordingly, the claims for such must be denied.

Alternatively, it appears from the evidence that the claimant did not begin to seek the care of a psychiatrist until after his conflict with Mr. Becker in late summer of 1996. He first began treating with Dr. Cerra on 9/10/96, which was prior to the filing of the Petition for Benefits dated 10/15/96 which sought authorization of psychiatric care and authorization for an IME with Dr. Cerra. Based upon the facts and the evidence, I find that there is competent and substantial evidence to support the position of the E/C that the subject incident is not, by clear and convincing evidence, the major contributing cause of the Claimant's need for authorization of a psychiatrist.

Section 440.09 (1) provides that "mental disorders or injuries occurring as a manifestation of an injury compensable under this section shall be demonstrated by clear and convincing evidence." It appears from the evidence that any need the claimant may have had for psychiatric care was the result of the disciplinary action taken against the claimant as opposed to being related to the 12/3/95 incident. Dr. Overcash indicated that the claimant did not need any psychiatric care as a result of the 12/3/95 incident. Although the medical opinion testimony of Dr. Domingo Cerra, psychiatrist, is not admissible, it appears that he did not have sufficient knowledge concerning all potential factors pertaining to the etiology of the claimant's psychiatric problems. Dr. Cerra could not differentiate which of the claimant's multiple prior surgeries had more of an effect on the claimant than any other. When asked if the claimant's psychiatric problems were related to the 12/3/95 incident, Dr. Cerra replied, "It may or may not. I don't know anything about the event in 1995. It may or may not. I don't have a clue. Until I get that information, I don't know how it rolls in here." I do not find clear and convincing evidence of

any mental or nervous injury occurring as a manifestation of a compensable injury as required by Section 440.09 (1).

Finally, the claimant is not entitled to PTD benefits unless the compensable injury incurred in the course and scope of employment is a "catastrophic" injury as defined by §440.02 (34), Florida Statutes (Supp. 1994). Bob Wilson Dodge v. Mohammed, 692 So. 2d 287 (Fla. 1st DCA 1997). Based upon the evidence, the claimant has failed to meet his burden of establishing that he has suffered a "catastrophic" injury, especially in light of the finding that Dr. Overcash released him to return to work without any permanent restrictions as a result of the subject injury. Indeed, there is a "complete absence of vocational evidence to suggest that claimant is unemployable or totally disabled due to physical limitations." Bishop v. Baldwin Acoustical and Drywall, 696 So. 2d 507 (Fla. 1st DCA 1997). "This case involves a failure of proof on the part of the claimant, the party in this case with the burden of proof." Bishop, 696 So. 2d at 512.

WHEREFORE, based upon the foregoing findings of fact, the following represent the conclusions of law for these proceedings:

1. The incident of 12/3/95 is compensable, but resulted in no permanent injury or permanent disability.
2. The claim for temporary partial disability (TPD) from 3/21/96 and continuing is denied.
3. The claim for permanent total disability (PTD) from 1/31/97 is denied.
4. Authorization of a psychiatrist is denied.
5. Authorization of a psychiatric IME is denied.
6. Interest, costs and attorney's fees are denied, except that the parties agreed for jurisdiction to be reserved as to whether there is entitlement to a fee and costs concerning the abdominal surgery which has already been provided.

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida.

_S/_____
JONATHAN D. OHLMAN
JUDGE OF
COMPENSATION CLAIMS

THIS IS TO CERTIFY that on March 5th, 1998, the above Order was entered in the office of the Judge of Compensation Claims, and a copy was mailed to each party and counsel at the address listed above.

__s/_____
Judicial Assistant

APPENDIX "N"

Excerpt of Record of Hearing as to Petitioner Bryant before Hon. Jonathan D. Ohlman, Judge of Compensation Claims, held on September 9, 1997

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MR. STALEY: Yes, Your Honor. Specifically as to the deposition of Dr. Brooks, I would point out that that was under emergency circumstances. I would also assert that at least Dr. Brooks and the other records contained in his deposition as a totality contain observations in addition to lay opinion and that those observations would be admissible. I would also assert the lack of constitutionality of 440.13 (5) (e) on multiple grounds including violation of separation of powers, including violation of Article II and IV regarding fair trials, etcetera, etcetera, etcetera.

JUDGE OHLMAN: Okay. Just so we don't get off too far on that, my apology is that since the courts have held that a Judge of Compensation Claims is not empowered to adjudicate the constitutionality of the statute, that although I appreciate your raising it, there's no sense in either side arguing it because I can't make any findings--any binding determination of that. So, it is raised, but if need be it will have to be discussed at the --at the next level. (Transcript, p. 405-406)

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APPENDIX "O"

Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 10, 1998, as to Petitioner Bryant

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STATE OF FLORIDA
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT B

JEFF BRYANT,

Claimant,

Claim No. 261-29-2936
v. D/A 2-14-96
GOLDEN FLAKE and
LIBERTY MUTUAL INS. CO.

Employer

Michael B. Staley, Attorney for Claimant
Mark A. Massey, Attorney for Employer/Carrier

ORDER

Pursuant to due notice of Hearing, this matter came on for hearing before the undersigned at Ocala, Marion County, Florida on Tuesday, September 9, 1997. Present and representing the Employee was Michael B. Staley of Ocala, Florida. Present and representing the Employer/Carrier was Mark A. Massey of Ocala, Florida. With agreement of the parties, final consideration was delayed until February 27, 1998.

At the pre-trial or prior to this matter being submitted for determination, the parties, by counsel, arrived at the following stipulations:

1. That the undersigned Judge of Compensation Claims has jurisdiction of the subject matter and parties; and that venue is proper.

2. That sufficient notice of the accident and of the hearing was received by the respective parties.

3. That there was an employer/employee relationship on this date of accident sufficient for this employee to be covered pursuant to Chapter 440 of the Florida Statutes.

4. That the trial should be bifurcated in order to determine whether the Claimant sustained a compensable accident on 2-14-96. Should the evidence support a finding in favor of the Claimant, a subsequent hearing will be set to adjudicate all remaining issues in dispute.

It was the position of the Claimant that he sustained a work related injury on 2-14-96, and is entitled to certain workers' compensation benefits under Chapter 440 of the Florida Statutes. It was the position of the E/C that no compensable accident occurred, and that if it is determined that a compensable accident did occur, the Claimant's failure to give adequate notice of the incident precludes his right to benefits.

Testifying for the Claimant was the Claimant's wife, in addition to the Claimant. Testifying for the E/C were Charles Browning, Gerald Gueryn and Nellie Jones (live) and the Claimant (by deposition). In addition to the foregoing witnesses, there were several exhibits marked for evidence, each of which was identified on the record during of trial. Although I have reviewed all of the aforementioned evidence, I have not attempted to summarize or describe all of it in this order.

Based upon the foregoing stipulations and all of the evidence presented, I hereby make the following findings of fact:

1. I accept the stipulations of the parties and incorporate them by reference as if set out at length herein.

2. Jeff Bryant was born 6-21-55 and is a high school graduate with some college courses completed thereafter. The subject incident occurred on 2-14-96 when he was at work for Golden Flake as a maintenance man. He remembers talking to some co-employees and then found himself on the floor. The Claimant believes that he fainted or passed out, but he did not have any memory of the sequence of events prior to his awakening on the work room floor. When he arose, he felt nauseous and dizzy. He was taken to the Emergency Room and released. He attempted to return to work, but after going in for a few hours one day, the Claimant believed that, due to some continuing problems, he would be unable to continue so he resigned. Mr. Bryant also acknowledged that he suffered from Klippel-Feil syndrome, which was a pre-existing condition. According to the Claimant, this syndrome causes neck and shoulder pain as well as headaches. He had seen Dr. Martin Freed, an orthopedic specialist in Ocala, for more than a year for treatment of this condition. he had also received treatment prior to the accident from Dr. Ken Ng, an Ocala neurologist, and a Dr. Harmon in Gainesville.

3. The initial question is an evidentiary one. The Claimant sought to introduce deposition testimony from Dr. Joel Brooks and Dr. Jose Gaudier, who were the only two medical experts to testify in this case. When the Claimant attempted to introduce medical testimony from the aforementioned witnesses, the E/C raised a timely objection, asserting that neither of the witnesses was qualified to offer medical opinions in light of the limitations set out in Section 440.13(5)(e), Fla. Stat. (1995). The claimant responded by stating that the treatment

furnished by Dr. Brooks was done on an emergency basis, and by contending that the statutory limitation on presentation of medical testimony was unconstitutional. With regard to any constitutional arguments, I advised the parties that, as a judge of compensation claims, I could not adjudicate the constitutionality of a statute. Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. 1st DCA 1983), approved on other grounds 452 So. 2d 932 (Fla. 1984), appeal dism'd 469 U. S. 1030, 105 S. Ct. 498 (1984). Therefore, any constitutional arguments would have to be presented to an appropriate forum.

4. As concerns the other arguments for admitting the medical opinions of these two witnesses, the circumstances in this case resemble those as reported in Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), in which an injured worker went on his own to see a physician without seeking prior authorization, and then attempted to introduce testimony from such physician(s) at trial. In the present case, no motion for independent medical examination (IME) was filed prior to trial, and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section 440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (citation omitted)

When the claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in section 440.13(5)(e) of the Florida Statutes, the appellate court ruled that such witness could not properly

testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant receives medical treatment in an emergency setting, and the e/c objects to the introduction of testimony from the physicians whose opinions the claimant seeks to have admitted into evidence, the claimant has an affirmative obligation to request an IME in a timely manner in order to qualify one or more physicians to express opinions on the issue in dispute. When the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived, if the guidelines set out in Union Camp are to be followed. Otherwise, the trial would have to be continued after all parties and witnesses had appeared at the forum, and the legislative intent to facilitate the "prompt and cost-effective delivery of payments" will be unnecessarily frustrated and delayed. Section 440.015, Fla. Stat. (Supp. 1994). See also Fla. R. Work. Comp. P. 4.075 (c) (1). I would also note that the trial was already continued one time, with the concurrence of the Claimant, from June 10, 1997 to September 9, 1997. It should also be noted that this determination is limited to the particular facts presented herein; no wide-ranging policy statement should be inferred by the result in this proceeding. Had the facts been different, a different result might well have been reached. Finally, this decision seems to be required because of the appellate court's decision in the Union Camp case in the context of what medical testimony is properly admissible. I am unaware of, and was not cited to, any cases in which medical opinions were deemed admissible under circumstances substantially similar to the ones presented herein.

5. Without either Dr. Brooks or Dr. Gaudier qualified as an independent medical examiner, and as neither physician fits the other criteria in Section

440.13(5)(e), Fla.Stat. (1995), there is no medical opinion testimony to support the claimant's position on causation. Because the injury to the Claimant is not readily observable, such expert testimony is required. Vero Beach Care Center v. Ricks, 476 So. 2d 262 (Fla. 1st DCA 1985). This requirement is even more crucial when there is evidence of a pre-existing or idiopathic condition, as is the case here. Therefore, there is an absence of competent and substantial evidence which was tendered.

6. In arriving at these determinations, I have considered all of the evidence, have evaluated the candor and demeanor of those witnesses who appeared live before me, have resolved all conflicts in the evidence and have rejected all evidence and inferences that may be inconsistent with these findings and determinations. However, the decision here was based primarily on the legal reasons set forth above.

WHEREFORE, based upon the foregoing findings of fact, the following represents the conclusions of law for these proceedings:

1. The Petition for Benefits must be, and is hereby, denied and dismissed.

DONE AND ORDERED at Gainesville, Alachua County, Florida this 10th day of March, 1998

s/_____
JONATHAN D. OHLMAN
JUDGE OF COMPENSATION CLAIMS

I hereby certify that the foregoing order was entered on the 10th day of March, 1998, and that a conformed copy was sent on that date by U. S. Mail to the parties and counsel of record at their record addresses.

_____/s_____
SECRETARY TO JUDGE OHLMAN